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In the

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 639

LAURA A. McCLELLAN,

Petitioner,

v.

R. L. PHINNEY, District Director of Internal Revenue, JOHN W. MACY, JR., FREDERICK J. LAWTON, and ROBERT E. HAMPTON, Civil Service Commissioners,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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R. L. PHINNEY, District Director of Internal Revenue, JOHN W. MACY, JR., FREDERICK J. LAWTON, and ROBERT E. HAMPTON, Civil Service Commissioners,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on May 13, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. It is set forth in the Appendix hereto at page A-2. The Court of Appeals denied the Petition for Rehearing on July 30, 1964, Appendix, page A-6.

JURISDICTION

The judgment of the Court of Appeals was entered May 13, 1964 (R. 325). Petition for Rehearing was denied July 30, 1964 (R. 335). The jurisdiction of this Court is based on 28 U.S.C.A. Section 1254 (1).

QUESTION PRESENTED

Whether Petitioner was removed from her position with the Internal Revenue Service in accordance with applicable law and regulations?

REGULATIONS INVOLVED

The following regulations of the Internal Revenue Service as set forth in the Internal Revenue Manual (hereinafter called I. R. Manual) are involved:

§ 1980.1
§ 1981.3 (4)
§ 1981.4 (1)
§ 1981.4 (3)
§ 1981.6 (c)
§ 1982
§ 1986.2 (1) (e)
§ 1987.1

STATEMENT OF THE CASE

Petitioner, an Internal Revenue Employee for over fourteen (14) years, was discharged following her unsuccessful promotion appeal. She exhausted all appellate administrative remedies and then brought suit under 5 U.S.C.A. § 1009 and 5 U.S.C.A. § 652, citing applicable regulations of the Internal Revenue Service which had been violated.

Petitioner and Respondents filed Motions for Summary Judgment in the United States District Court, and judgment was granted on the Respondents' Motion (App. A-1). The United States Court of Appeals affirmed, and denied a Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

A. *Petitioner was not given the required written notice of her rights to reply to the charges against her, both orally and in writing.*

The Notice of Proposed Removal, dated December 10, 1959, to Miss McClellan (R. 36) advised her (R. 41) "you may reply personally and in writing within ten calendar days * * *" She was not notified therein, or otherwise notified in writing of her rights to reply "*both in person and in writing*" (emphasis supplied) as required by the Internal Revenue Regulations, as follows: Section 1986.2 (1) of the Internal Revenue Manual provides "*all notices of proposed adverse action involving employees who have job protection rights under parts 9 and 22* of the Civil Service Regulations, will contain the following information: ....." Sub-Section (e) under Section 1986. 2(1) is as follows: "(e) advice to the employee (veteran and non-veteran) that he has a right to reply both in person and in writing, and to furnish affidavits and evidence in support of his answer ....." (App. A-15).

Section 1987.1 I. R. Manual, (App. A-15) after stating that veterans have such right to make an oral reply, states "it is Revenue Service policy to grant employees covered by

Civil Service Regulations 9.102 (a)(1), the same right to make an oral reply under the same circumstances. This right to reply personally is in addition to the right these employees have to reply "in writing" to the letter of charges."

In addition to not receiving the required written notice of her rights to make both oral and written replies, Petitioner was not advised orally of such rights. Had she been so advised, she would have exercised her right of oral reply (R. 53).

The failure to notify Petitioner of her rights to reply orally and in writing was a clear and substantial violation of the Regulations quoted. It is well established that a classified Civil Service employee, such as Petitioner, must be removed in the manner and by the procedure required by law and the applicable regulations. (*Service v. Dulles*, 354 U.S. 363, 1 L. ed 2d 1402, 77 S. Ct. 1152; *Whiting v. Campbell*, 275 Fed. 2d 905; *Felix v. Government of the Virgin Islands*, 167 F. Supp. 702).

B. *Petitioner's removal was arbitrary and inequitable.*

The charges on which Appellant was removed (R. 36) were based entirely on information in memoranda contained in her Personnel File. Reference to these memoranda in this Record and the written charges based thereon, shows her removal to have been grossly inequitable and arbitrary, contrary to Section 1981.4 (1), of the Internal Revenue Manual, setting the policy of the Revenue Service to be "to assure that no arbitrary and inequitable disciplinary

action will be taken." (App. A-8). Petitioner would emphasize the following:

(1) The punishment was excessive in light of the regulations that required disciplinary actions to fit the infraction charged;

(2) exaggeration and misstatements of charges and failure to consider mitigating facts;

(3) failure to take prompt action to correct Petitioner's alleged deficiencies.

The removal of Appellant from her position, rather than reprimanding, suspending or demoting her, did not comply with either the spirit or letter of the regulations which detail the plan of disciplinary actions (Section 1982 I. R. Manual, App. A-9). It will be observed therein that disciplinary penalties are described in order of severity as: (1) oral admonishments (2) official written reprimand (3) demotions (4) suspensions (5) removals.

The record is clear that after alleged deficiencies as far back as 1952 (R. 313), no intermediate disciplinary penalties were imposed until the most drastic action possible, removal, was undertaken. It is stated in Section 1982.6, Removals, I. R. Manual (App. A-14):

> "REMOVALS: (1) Removal action will be taken whenever required by law or regulation or whenever warranted by the facts of the individual case such as repeated infractions or offenses for which previously administered oral admonishments, official reprimands and/or suspensions have not served to prevent repeti-

tion of offenses, or when the initial infraction or offense is so serious that it warrants removal.

"(2) It should be recognized that an employee who is removed for cause from his position also may be denied other employment on those grounds. Therefore, the greatest care and judgment must be applied in effecting a removal action. In exercising this judgment, the appropriate official must carefully, dispassionately and objectively consider all of the pertinent facts and evidence, pro and con, and decide the issue on the basis of what is fair and just and best serves the broad interests of the Revenue Service. If, after careful consideration of all the facts, there is sufficient evidence that the employee is guilty as charged, removal action should be *immediately taken* in accordance with statutory and regulatory requirements." (Emphasis supplied)

The regulations (Sections 1982.5 — Suspensions, I.R. Manual) provide even as to suspensions that they "should be used most sparingly and imposed only after admonishments or other official reprimands have been used without success or when the gravity of the offense is so serious as to warrant a more stringent corrective action and no other disciplinary action is appropriate." (App. A-13).

The same section indicates that a suspension is the penalty for serious or repeated misconduct or willful violation of a local, state or federal law, rule, regulation or administrative instruction. A suspension would have been appropriate in Miss McClellan's case only after a written reprimand and after proper proof of her offenses. The more drastic action of removal from her position after years of conscientious service can hardly be justified under any

theory, and certainly not under the cited regulations governing her employment and removal. Section 1981.3 (4) of the I. R. Manual provides, in summary:

> "The final disciplinary action to be taken must be fair and just and based on a careful evaluation of the nature of the offense as shown by all the evidence and facts, the effect of the action on the Revenue Service and its effect on the employee as an individual." (App. A-7)

Apparently, the alleged refusal to accept what she considered a demotion precipitated the decision to remove Appellant. The actual charges were then sifted from her file in an effort to "build a case" for removal. There was no consideration of the factors required by Section 1981.4 (3), I.R. Manual (App. A-8) where it is stated:

> "The best interests of the Service, the employee's work history, character and potential and any mitigating or aggravating circumstances will be considered in determining the severity of the penalty." (See R. 315 with respect to improvements noted in Appellant by Supervisor.)

A comparison of the charges contained in the Notice of Proposed Removal dated December 10, 1959 (R. 36) with the memorandum of October 13, 1958, by Joe Jamar, her supervisor, in which the events were originally recorded (R. 73) show exaggerations and mis-statements, Documentation is required. (§ 1981.6 (c), I.R. Manual, App. A-9). In Specification 1 under Charge III in the December 10, 1959, letter, it is stated, "When asked for a definite commitment as to your intentions of correcting this habit of *flying into a rage*, you stated, 'Never will I discuss anything with you

again except business.' You were given a warning about your display of temper on this occasion in a letter of October 13, 1958, from your supervisor, Joe R. Jamar, Collection Group Supervisor. In this letter your supervisor stated that it might be necessary to recommend a reprimand if the displays of temper continue in the future." (Emphasis supplied). Reference to the memorandum or letter in question (R. 73, 74) shows that the quoted statements above are far from accurate, being *slanted* against Miss McClellan. In paragraph 3 of the document of October 13, 1958, Jamar states: "I reminded you that as time went on, you were becoming more temperamentally unsuited for the type of employment in which you are engaged. You were again asked for a definite commitment as to your intentions about correcting this deficiency. Your reply was, 'Never will I discuss anything with you except business'." *There is nothing, of course, in the entire memorandum about "flying into a rage."*

Again, in the sixth paragraph of the memorandum of October 13, 1958, Jamar states that if Miss McClellan displays anger and goes into tirades during which members of the group and its methods of operations are condemned, "*it will be made the subject of a reprimand* and brought to the attention of proper higher authorities." Thus, as of October 13, 1958, Miss McClellan was definitely told that future temper displays would result in a reprimand. Miss McClellan, contrary to her supervisor's statement on which she relied (R. 54), *never received a reprimand prior to her*

receipt of the First Notice of Proposed Removal. (R. 9) Indeed, she was so *unaware** of any conduct on her part justifying disciplinary action that *she appealed on 10/22/59* her failure to receive promotion before the first letter of Notice of Proposed Removal was written on October 23, 1959. (R. 9 and 14). She had Satisfactory Efficiency reports for her entire Internal Revenue Career. (R. 53).

Furthermore, the last paragraph of Mr. Jamar's memorandum of October 13, 1958, states: "I might add that since the time we had our conference, *you have shown improvement in the subjects on which you received unsatisfactory ratings. Furthermore, I have noted that you have remained unusually calm since that date in your dealings with members of this group and taxpayers alike.*" (Emphasis supplied). The omission in the charges of the favorable statements regarding the improvements in her attitude and work is likewise significant.

It would appear that little effort has been made to adhere strictly to the facts in another instance, particularly in *Specifications 2 and 3 of Charge II* of the Notice of Proposed Removal dated December 10, 1959. (R. 36). These specifications should be compared to the contents of Office Memorandum from Jamar to Miss McClellan dated April 1, 1959 (R. 240). Specification 2 *sets out alleged statements made to Jamar while in a work performance discussion with Revenue Officer Cook.* The memorandum on the other hand makes no reference to the circumstances under which the remarks were made (See second paragraph of the memorandum), and the memorandum also contains the

added phrase, "*or words to that effect.*" Furthermore, there is *no mention in the memorandum of "loud and heated words,"* as stated in the specification. The memorandum states that Miss McClellan came into Mr. Jamar's office where Mr. Ferrell was present and made the remarks with reference to the Survey report. The memorandum said nothing *about her being loud in this instance,* though she is admonished from interrupting fellow workers by talking to them about business and personal matters in which they are usually not interested or concerned.

It seems again that the author of the Notice of Proposed Removal was attempting by adding a phrase or omitting a phrase here and there to make a stronger case for her removal than the facts justify. Such reliance on "puffed-up" charges shows again that her removal based thereon was inequitable and arbitrary.

C. *Petitioner should have been afforded an investigation by the Inspection Service of Internal Revenue because of the introduction by Respondents into the public Court record of an accusation of abusive or discourteous treatment of a taxpayer.*

Included in the record introduced into the trial court by Respondents was an alleged incident in August 1957 (R. 313) in which Petitioner is accused of having talked unusually loud about a taxpayer within the taxpayer's hearing distance, and such talk was overheard by the taxpayer and caused him to be upset.

Internal Revenue Manual Exhibit 1980-1 (App. A-7) lists misconduct which must be referred to Inspection. Item 12 of the list is "abusive or discourteous treatment of taxpayers or violation of their civil rights". Though the alleged incident was not part of the formal charges, injecting it into the public Court record for the presumed purpose of justifying her removal, requires the same solution, namely, an investigation by the Inspection Service of Internal Revenue, to prove or disprove the allegation.

CONCLUSION

For the reasons given above, petitioner's discharge was illegal, and a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Caption omitted) (Filed in Clerk's office August 16, 1963.)

JUDGMENT

The Motions for Summary Judgment filed herein by Plaintiff and by Defendants having been presented, and the Court being advised,

The Court finds that the Plaintiff Laura A. McClellan was removed from her Civil Service position as a Revenue Officer (Intern) GS-7 in the Houston, Texas Office of the Internal Revenue Service on January 15, 1960, in accordance with the applicable law and regulations, and that all applicable procedural requirements were met in effecting her discharge.

The Court further finds that the cause for removal of the Plaintiff Laura A. McClellan, a classified employee, was for the judgment of the removal officer and that the actions of the removal officer in dismissing the plaintiff should not be reviewed by this Court except to insure compliance with the pertinent statutory requirements.

The Court having overruled Plaintiff's Motion for Summary Judgment herein and having sustained Defendant's Motion for Summary Judgment herein,

It is ORDERED, ADJUDGED and DECREED that Plaintiff Laura A. McClellan, take nothing by her suit and the same is hereby dismissed.

SIGNED this the 16 day of August 1963.

ENTERED: Civil 5 Page 844

UNITED STATES DISTRICT JUDGE

/s/ BEN H. RICE, JR.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21218

LAURA A. McCLELLAN,

Appellant,

v.

R. L. PHINNEY, District Director of Internal Revenue, et al.,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(May 13, 1964.)

Before HUTCHESON, PRETTYMAN* and JONES, Circuit Judges.

PER CURIAM: Laura A. McClellan was removed from her position in the Internal Revenue Service as an officer-intern. She brought this suit in the District Court attacking her removal as illegal and seeking reinstatement with back pay. The court found that the removal was "in accordance with the applicable law and regulations, and that all applicable procedural requirements were met in effecting her

* Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

discharge." She had availed herself of all applicable administrative procedures for review in the agency and before the Civil Service Commission.

We find no error. *Hargett v. Summerfield*, 243 F. 2d 29 (D.C. Cir. 1957), *cert. denied* 353 U.S. 970; *Williams v. Cravens*, 210 F. 2d 874 (D.C. Cir. 1954), *cert. denied* 348 U. S. 819; *Powell v. Brannam*, 196 F. 2d 871 (D.C. Cir. 1952).

AFFIRMED.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1963

No. 21218

D. C. Docket No. 1286

LAURA A. McCLELLAN,

Appellant,

v.

R. L. PHINNEY, District Director of Internal Revenue, et al.,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

Before HUTCHESON, PRETTYMAN* and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged by this Court that the appellant, Laura A. McClellan, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

---

*Of the D. C. Circuit, sitting by designation.

May 13, 1964

Issued as Mandate: Aug. 11, 1964.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21218

LAURA A. McCLELLAN,

Appellant,

v.

R. L. PHINNEY, District Director of Internal Revenue, et al.,

Appellees.

Appeal from the United States District Court for the Western District of Texas

---

ON PETITION FOR REHEARING (July 30, 1964)

Before HUTCHESON, PRETTYMAN* and JONES, Circuit Judges.

BY THE COURT:

The Petition for Rehearing filed in the above numbered and entitled cause is hereby DENIED.

---

*Senior Circuit Judge of the D. C. Circuit, sitting by designation.

Exhibit 1980-1

The list below contains some of the allegations of misconduct which must be referred to the servicing Inspection office for investigation. This list is furnished as a guide and is not to be considered as all-inclusive. Some of these violations are subject to criminal prosecution as well as severe disciplinary action.

* * * * *

12. Abusive or discourteous treatment of taxpayers or violation of their civil rights.

* * * * *

1981.3 General Principles

* * * * *

(4) Management must thoroughly review and consider all the evidence and data of record before making a final decision and attach due weight to factors supporting the employee's position whether or not he offers such factors in his own defense. In general, any information which has a bearing, directly or indirectly, upon the incident upon which the charge is based may be considered relevant evidence, whether it be sworn testimony, recollection, facts of record, eye-witness accounts, etc. The final disciplinary action to be taken must be fair and just and based on a careful evaluation of the nature of the offense as shown by all the evidence and facts, the effect of the action on the Revenue Service and its effect on the employee as an individual.

* * * * *

1981.4 Policy

(1) It is the policy of the Revenue Service to *assure that no* arbitrary and inequitable *disciplinary action will be taken.* The Revenue Service expects, among other things, its employees to perform their work conscientiously in the most effective manner possible; conduct themselves during and outside working hours in a manner which will not reflect discredit on the Revenue Service; respect the administrative authority of supervisors directing their work; and observe the spirit as well as the letter of the laws, regulations, rules and Treasury and Revenue Service policies governing their conduct.

* * * * *

(3) A Standard Schedule of Offenses and Disciplinary Penalties will not be used in the Revenue Service for determining the penalty for a particular offense. Each case involving an offense will be considered individually and dealt with on its own merits. The penalty shall be that which, in the considered judgment of the disciplinary official or supervisor, will be fair and just and will promote and maintain a proper state of discipline and morale. Where a specific penalty is prescribed by statute, such penalty must be imposed. The best interests of the Service, the *employee's* work history, character and potential and any mitigating or aggravating circumstances will be considered in determining the severity of the penalty. The rights of employees to present their side of any charge will not be abridged and the exercise of such rights will not be discouraged or made the occasion of any prejudicial action.

1981.6 Responsibility

* * * * *

(c) Supervisors are also responsible for the documentation necessary to fully support (as far as possible without investigation) disciplinary actions for offenses which are administrative in nature. (See Subsection 1983: (2) below.)

1982 TYPES OF DISCIPLINARY PENALTIES

1982.1 GENERAL

This subsection contains a discussion of the types of disciplinary penalties in the order of their severity and should prove helpful to appropriate officials and supervisors in determining the penalty to be imposed for a particular offense.

1982.2 ORAL ADMONISHMENTS

(1) An oral admonishment is an interview between the immediate supervisor and the employee on the employee's breach of conduct or his failure to observe a local, state or Federal law, regulation, or administrative instruction or policy. Oral admonishments should be used when the offense is not of a serious nature and it can be reasonably expected that the employee's conduct or behavior will improve.

(2) Under normal conditions, oral admonishments should take the form of private discussions. Only during an extreme emergency, when immediate corrective action is necessary,

should he be admonished before fellow employees. The admonishment is, in substance, an informal interview in which the supervisor advises the employee of the conduct or behavior expected, and together they agree on a course of action which is understood by both. This informal interview should be properly planned and conducted by the supervisor after all the facts have been obtained and evaluated. Such action on the part of the supervisor will insure that the interview will progress in an orderly fashion and not wander unnecessarily to extraneous matters. It should be conducted so as not to create employee dissatisfaction or resentment.

(3) Supervisors should confirm, in writing, an oral admonishment when they feel that the minor infraction may occur again and possibly require more severe disciplinary action. The letter of confirmation to the employee will give the reasons for the admonishment and will caution him regarding his future conduct. This type of letter is not to be construed as a letter of official reprimand. (See subsection 1982.3 below.) Copies of letters of confirmation will not be placed in the employee's official personnel folder but will be retained by the supervisor. Whether or not a written confirmation is made, supervisors will make a notation of an admonishment on the Employee Record Card (OF 4b) for subsequent follow-up action.

1982.3 OFFICIAL WRITTEN REPRIMAND

(1) An official written reprimand is a penalty appropriate for a significant infraction or repeated minor infractions.

The written reprimand is used as a means for recording incidents of misconduct or summarizing previous incidents when the oral admonishment has failed and when it becomes necessary to document dissatisfaction with an employee's conduct. It also serves as a means for alerting the employee to the fact that continued misconduct may bring more serious consequences. There is a close relationship between the oral admonishment and the written official reprimand, particularly when the reprimand is used following a disregard of agreements and understandings reached in the oral admonishment.

(2) The reprimand is usually recommended by the immediate supervisor to the appropriate official who will give full and fair consideration to all the facts before making a final decision. The inquiry into the facts may, at the discretion of the official, include an informal discussion with the employee. Where a decision to take such action has been made, the letter of official reprimand should be prepared with the advice and assistance of the personnel office and signed by the official having this authority. The reprimand should contain:

(a) A specific description of the offense including time, place, and circumstances:

(b) If appropriate, a restatement of past offenses for which admonishments or other penalties were given, together with corrective action that was suggested by the supervisor;

(c) The following Statements: "This is a letter of official reprimand. A copy of this letter will be placed in your official personnel folder;" and

(d) A statement, when appropriate, that repetition of the offense may result in more severe disciplinary action.

(3) Letters of official reprimand issued by Regional, District, or Service Center diciplinary officials *will not include* statements to the effect that the employee may, if he so desires, submit a written reply to the reprimand or appeal the reprimand to higher authority. However, this would not prevent the employee from submitting a written reply and/or a written request to have the reprimand reviewed by higher Revenue Service authority in accordance with the appeals procedure in Subsection 1988. Further, review decisions of appealed reprimand will omit any reference to any avenue of appeal the employee may still have under Subsection ~~1000~~ ~~1700~~. [Handwritten: 198(12)]

(4) Since it is Revenue Service policy not to include a statement concerning the employee's opportunity to reply in the letter of reprimand, all reprimands and any replies thereto will be filed on the temporary side of the employee's official personnel folder. This filing requirement is the same irrespective of whether or not the employee replies to the letter of reprimand. (Auth: CSC Ltr. dtd. 8-7-58, PRI: KDS: bmg, LM-7615).

(5) Letters of reprimand and related records may not be withdrawn from the official personnel folder except when the employee is separated from employment with the Treasury Department. (See Subsection 1(11)16.2: (2), Part I of this Manual.)

1982.4 DEMOTIONS (AND REDUCTIONS IN RANK)

Demotions for the purpose of these instructions are changes from one position to another position of a lower grade or reduction in rank or salary. Demotions as a disciplinary penalty should be used only in unusual and exceptional situations and when other types of penalties would not serve to prevent future offenses. (See subsection 1911, Part 1, this manual.)

1982.5 SUSPENSIONS

(1) A suspension is the temporary nonduty, nonpay status of an employee as a penalty for serious or repeated misconduct or wilful violation of a local, state or Federal law, rule, regulation, or administrative instruction; or as a protective measure in emergency situations pending a proposed removal or investigation. Emergency suspensions are effected promptly (see subsection 1986.21 below) and must be supported by conclusive evidence of record that a "bona fide" emergency situation does exist. All proposed suspensions should be discussed with the personnel officer to insure that statutory and regulatory requirements will be observed.

(2) Consideration should be given to the fact that suspensions as a disciplinary penalty not only penalize the employee who has committed the offense but also the work group and the Revenue Service, in that the services of the employee are lost during the suspension period and work production may suffer. In some cases, the loss is multiplied when operations dovetail to the extent that one absence impedes the work of related functional units. Suspensions

as a disciplinary penalty should be used most sparingly and imposed only after admonishments or other official reprimands have been used without success or when the gravity of the offense is so serious as to warrant a more stringent corrective action and no other disciplinary action is appropriate. Suspensions as a general rule, unless otherwise required by statute, should be limited to short periods of time, normally not more than ten workdays. Generally, when an employee has committed an offense which warrants a suspension in excess of ten workdays the offense is serious enough to consider removal action.

1982.6 REMOVALS

(1) Removal action will be taken whenever required by law or regulation or whenever warranted by the facts of the individual case such as repeated infractions or offenses for which previously administered oral admonishments, official reprimands and/or suspensions have not served to prevent repetition of offenses, or when the initial infraction or offense is so serious that it warrants removal.

(2) It should be recognized that an employee who is removed for cause from his position also may be denied other employment on those grounds. Therefore, the greatest care and judgment must be applied in effecting a removal action. In exercising this judgment, the appropriate official must carefully, dispassionately and objectively consider all of the pertinent facts and evidence, pro and con, and decide the issue on the basis of what is fair and just and best serves the broad interests of the Revenue Service. If, after careful consideration of all the facts, there is sufficient

evidence that the employee is guilty as charged, removal action should be immediately taken in accordance with statutory and regulatory requirements.

* * * * *

1986.2 ADVANCE NOTICE OF PROPOSED ADVERSE ACTION

(1) All notices of proposed adverse action involving employees who have job protection rights under parts 9 and 22 of the Civil Service Regulations will contain the following information:

* * * * *

(e) Advice to the employee (veteran and nonveteran) that he has a right to reply both in person *and* in writing, and to furnish affidavits and evidence in support of his answer. The advance notice will specifically indicate the name and address of the person to whom the reply may be made and that the reply must be made within the time specified in the notice—usually 10 calendar days.

* * * * *

1987.1 GENERAL

(1) An employee who has job protection rights under the provisions of section 14 of the Veterans' Preference Act of 1944 has a statutory right to make an oral reply before the appropriate official or his designee(s) in connection with a notice of proposed adverse action. It is Revenue Service policy to grant employees covered by Civil Service Regulation 9.102(a)(1), the same right to make an oral reply under the same circumstances. This right to reply personally is in addition to the right these employees have to reply "in writing" to the letter of charges.

(2) Requests from these employees to make an oral reply to a letter of charges should be included in the "written reply" to the charge letter. However, an oral request will be accepted provided it is made not later than the date shown in the letter of charges for submitting the written reply. The time, place, to whom and essence of the oral request should be recorded in a memorandum for the file and incorporated in the case file.

(3) Where the appropriate official does not personally hear the oral reply of the employee he may designate a representative to hear the case for him. If a representative is chosen, he should be an employee who has a demonstrated record for fairness, impartiality and soundness of judgment necessary in arriving at sound recommendations. The designee should become thoroughly familiar with the entire disciplinary case before the oral reply is heard. This will permit the designee(s) to bring out all the facts to make a just and fair recommendation to the appropriate official.

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755-834—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 639

LAURA A. MCCLELLAN, PETITIONER

v.

R. L. PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court for the Western District of Texas rendered no opinion. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. A–2—A–3) is reported at 331 F. 2d 307.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1964 (Pet. App. A–4). A timely petition for rehearing was denied on July 30, 1964 (Pet. App. A–6). The petition for a writ of certiorari was filed on October 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's removal from her position with the Internal Revenue Service was effected in compliance with the applicable procedural requirements.

STATUTE AND REGULATION INVOLVED

Section 6 of the Lloyd-LaFollette Act of 1912, 37 Stat. 555, as amended, 5 U.S.C. 652, provides:

> SEC. 6 (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsec-

tion shall apply to a person within the purview of section 14 of the Veterans' Preference Act of 1944, as amended, only if he so elects.

Section 9.102(a) of the Civil Service Commission Regulations, 5 C.F.R. 9.102(a) (1961 Rev.), provides:

* * * * *

(1) *Actions against employees.* (i) No employee, veteran or nonveteran, shall be separated, suspended, or demoted except for such cause as will promote the efficiency of the service and for reasons given in writing. The agency shall notify the employee in writing of the action proposed to be taken. This notice shall set forth, specifically and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing a written answer to such charges and for furnishing affidavits in support of his answer. He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency. If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practical date with a written decision. In the decision that removal or other adverse action will be taken, the agency shall notify the employee of the reasons for the action and the effective date of the action; also of the right of the employee to appeal to the appropriate office of the Commission and the time limit within which his appeal must be submitted as provided in § 9.106. Copies of the charges, notice of hearing (if any), answer, reasons for removal, or

other action shall be made a part of the records of the agency concerned.

* * * * *

STATEMENT

Petitioner, a non-veteran former employee of the Internal Revenue Service, seeks review of a decision of the Court of Appeals for the Fifth Circuit which affirmed the district court's dismissal of her suit challenging her removal from the federal service. The pertinent facts are these:

On March 23, 1958, petitioner was assigned to the position of Revenue Officer (Intern), Grade GS–7, under the internal career development program of the Internal Revenue Service (R. 291–292).[1] This program was to last eighteen months and successful participants were eligible for promotion to the position of Revenue Officer (Journeyman), Grade GS–9 (R. 295–297). On October 14, 1959, petitioner was told that she would not receive such a promotion but would be reassigned to the Office Collection Force as a Tax-Examiner, Grade GS–7.

On October 23, 1959, petitioner was sent a notice of proposed removal by respondent R. L. Phinney, the District Director of Internal Revenue (R. 9–14). The notice contained nine charges of personal misconduct and proposed petitioner's removal from the Internal Revenue Service as of November 26, 1959. This notice of proposed removal was cancelled on November 12, 1959, because petitioner had appealed from her supervisor's decision not to promote her to the position of Revenue Officer (Journeyman) (R.

[1] "R" references are to the printed transcript of record in the Court of Appeals, which has been filed with this Court.

35–36). She was informed that the cancellation of the notice did not preclude the Service from issuing a new notice after the promotion appeal had been resolved (R. 36).[2]

In a letter dated December 10, 1959, petitioner was notified that she was to be removed from her position in order to promote the efficiency of the Internal Revenue Service (R. 36–42). The notice charged petitioner with (1) insubordination, (2) disrupting the work of co-workers by making loud and disparaging remarks, and (3) displaying resentment and uncontrolled temper when suggestions and constructive criticism were made by her supervisors. The District Director cited two specifications in support of the first charge and three specifications in support of both the second and third charges (R. 37–41).

The notice of proposed removal, which was received on December 14, 1959, advised petitioner of her right to "reply personally and in writing" to the charges made (R. 41). On December 21, 1959, petitioner sent a letter to the District Director, in which she replied at length to the charges (R. 250–276). The Acting District Director, upon consideration of the charges and petitioner's reply, notified petitioner on December 29, 1959, that she would be removed from the Internal Revenue Service, effective January 15, 1960 (R. 42–44). He advised her that she had

[2] The District Director, upon reviewing petitioner's promotion appeal, "found no substantiation for reversing" the decision of the supervisor and, therefore, denied her appeal (R. 35). On December 8, 1959, B. Frank White, the Regional Commissioner of Internal Revenue, also denied petitioner's appeal (R. 57–58). Under the provisions of Section 1868 of the Internal Revenue Manual, this decision was final.

the right to appeal this adverse determination to the Regional Commissioner of the Internal Revenue Service or to the Civil Service Commission (R. 43). Petitioner was also advised that should she appeal to the Commissioner on the ground that the proper procedures were not followed, or the discharge was effected for political reasons, or resulted from discrimination, the agency could not act on her case until the Commission had rendered its decision.

On January 6, 1960, petitioner appealed the decision of the District Director to B. Frank White, the Regional Commissioner of Internal Revenue. By a letter dated January 27, 1960, petitioner was notified that as she had filed an appeal on January 23, 1960, with the Eighth Civil Service Region (R. 302), her appeal before the agency would be held in abeyance pending the disposition of her case by the Civil Service Commission (R. 59).

Counsel for petitioner, in letters dated January 23, 1960, and January 30, 1960, requested the Director of the Eighth Civil Service Region to hold a hearing with respect to his client's appeal (R. 219–301). On February 10, 1960, counsel was informed that as petitioner was not a veteran, no hearing would be held by the Eighth Civil Service Region. It was suggested that he evaluate his client's case in light of the controlling Civil Service Regulations and that, should he desire to submit other briefs in addition to that dated January 30, 1960 (R. 220–239), he was at liberty to do so (R. 60–62).

The Regional Director of the Eighth Civil Service Region, after reviewing the record in petitioner's case and considering the extensive briefs filed on her

behalf, denied her appeal. He determined that petitioner was removed from the federal service in accordance with the procedures set forth in Section 9.102(a)(1) of the Civil Service Regulations, 5 C.F.R. 9.102(a)(1) (1961 Rev.) (R. 63–65). The Regional Director noted that the Commission had no authority to review the merits of a removal action in the case of a non-veteran. Petitioner was duly informed that she could appeal the Eighth Region's decision to the Board of Appeals and Review of the Civil Service Commission.

By letter of August 22, 1960, petitioner appealed to the Board of Appeals and Review, alleging that there was procedural error in her removal and that the penalty of discharge was excessive (R. 180–187). On November 30, 1960, the Board of Appeals and Review, upon consideration of the entire record, petitioner's contentions and the additional documents submitted, notified petitioner that (R. 65–70):

> Specification (1) of Charge I is not specific enough to provide you with a fair opportunity for refutation, and for this reason it has not been sustained. However, in view of the fact that Specification (2) definitely supports Charge I, the validity of Charge I as well as of Charges II and III is not effected. As a result of its consideration of your case, the Board has determined that the Internal Revenue Service complied with procedural requirements of Section 9.102(a)(1) of the Civil Service Regulations in effecting your removal. Accordingly, the decision of the Eighth U.S. Civil Service Region, contained in its letter of August 16, 1960, to you, is affirmed as amended herein.

On May 31, 1962, petitioner brought this action. In granting the government's motion for summary judgment, the district court found that petitioner "was removed from her Civil Service position as a Revenue Officer (Intern) GS–7 in the Houston, Texas Office of the Internal Revenue Service on January 15, 1960, in accordance with the applicable law and regulations, and that all applicable procedural requirements were met in effecting her discharge" (Pet. App. A–1). The court of appeals affirmed *per curiam*, finding "no error" in the agency's removal of petitioner (Pet. App. A–2—A–3).

ARGUMENT

The decision of the court below is clearly correct. Since the petition presents no question of general importance and there is no conflict between the circuits, further review is not warranted.

It is well-settled that matters relating to the discharge of federal executive employees are within the discretion of the employing agencies and that judicial review of such matters is limited to a determination of whether the dismissal was effected in compliance with the applicable statutory and regulatory procedures. *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A.D.C.), certiorari denied, 353 U.S. 970. In this case, in conformity with Section 6(a) of the Lloyd-LaFollette Act of 1912, 5 U.S.C. 652(a), Part 9 of the Civil Service Commission Regulations, 5 C.F.R. 9.101, *et seq.* (1961 Rev.), and the pertinent provisions of the Internal Revenue Manual, petitioner received a written notice of the charges preferred against her (R. 36–42), an opportunity to

file a reply thereto (R. 41, 250–276), and a written decision stating the reasons for her removal (R. 41–42). She was also informed of her right to appeal within the Agency and to the Civil Service Commission (R. 43–44).

Petitioner contends, nevertheless, that certain procedural requirements were not complied with by the removing agency. Specifically, she argues that she was not given the required written notice of her right to reply to the letter of charges both in person and in writing, that she should have been afforded an investigation by the Inspection Office of the Internal Revenue Service, and that her removal was arbitrary and inequitable (Pet. 3–11). These arguments are plainly without merit.

(1) Section 1986.2(1)(e) of the Internal Revenue Manual provides that all notices of proposed adverse actions, involving employees protected under Part 9 of the Civil Service Regulations, 5 C.F.R. 9.101, *et seq.* (1961 Rev.), should advise the employee (veteran and nonveteran) that (Pet. App. A–15):

> * * * [H]e has a right to reply both in person *and* in writing, and to furnish affidavits and evidence in support of his answer. The advance notice will specifically indicate the name and address of the person to whom the reply may be made and that the reply must be made within the time specified in the notice—usually 10 calendar days.[8]

[8] The word "and" is underlined in the text of the manual. It should be pointed out that in Internal Revenue Service Regional Office Memorandum No. 19–9 of May 11, 1954, there is a requirement that the notice of proposed removal state that "the employee has the right to answer the charges *personally or in writing*, and that he may furnish affidavits in support of his

The notice of proposed removal, which was sent to petitioner on December 10, 1959, stated that "you may reply personally and in writing within ten calendar days from the receipt of this letter showing cause if any why removal action should not be taken" (R. 41). Petitioner asserts that this notice did not inform her of "her rights to reply *'both in person and in writing'* (emphasis supplied) as required by the Internal Revenue Regulations * * *" (Pet. 3).

A reasonable interpretation of the December 10, 1959 notice is that the petitioner could have replied personally and she could also have replied in writing to the charges preferred. See *O'Brien* v. *United States*, 284 F. 2d 692, 694 (Ct. Cl.). In any event, when petitioner received the first (October 23, 1959) notice of proposed removal—which contained the identical phrase "personally and in writing" as the December 10th notice—she went to Austin, Texas, and discussed her proposed removal with the District Personnel Officer, James L. Funderburgh, Jr. There, according to Mr. Funderburgh, when petitioner was informed of her appeal rights, she replied that she did not want to use the oral procedure but preferred to write her answer because she could cover the points better and might lose her temper with the District Director.[4] In view of this conversation, there can

answer" (emphasis added) (R. 85). With respect to that provision, it seems clear that the agency intended that its employees be notified that they had the right to reply to a letter of charges in either one of two ways.

[4] The District Personnel Officer's affidavit, which was attached to the respondents' reply brief in the district court, may be found in the appendix to the brief which respondents filed in the court of appeals.

be no doubt that petitioner, upon reading the December 10th notice, knew that she could reply to the letter of charges in person as well as in writing.

(2) Section 1984 of the Internal Revenue Manual provides that where it is alleged that an employee has engaged in criminal, infamous, dishonest, immoral or disgraceful conduct, an investigation must be undertaken by the Inspection Office of Internal Revenue Service and not by the employee's supervisors (R. 116–117). In this case, none of the charges preferred against petitioner—insubordination, disrupting the work of co-employees, and displaying resentment and uncontrolled temper towards her supervisors—come within the categories of misconduct set forth in Section 1984. Rather, the offenses for which petitioner was removed are plainly of the kind which are listed in the Internal Revenue Manual as being "administrative in nature" and therefore require no investigation on the part of Inspection Office (I.R. Manual § 1983 (1); R. 115–116). Moreover, contrary to petitioner's contention (Pet. 10–11), the Internal Revenue Service never relied upon the August 1957, incident involving petitioner and a taxpayer to justify her removal from the federal service. Thus there was no reason to have this incident investigated by the I.R.S. Inspection Office.

(3) Petitioner argues that her removal was "arbitrary and inequitable" on several grounds, all of which, while presented as procedural violations, go to the merits of her discharge (Pet. 4–10). Even were the merits open to judicial re-examination, petitioner's contentions would be baseless. While petitioner claims that the penalty of removal was too

severe, in that no other disciplinary actions had previously been imposed upon her (Pet. 4–7), the record discloses that in October 1957, petitioner was verbally warned by her supervisor about openly displaying her displeasure and dissatisfaction in office operations (R. 313). Furthermore, in October 1958, petitioner was admonished by the collection group supervisor for losing her temper and going into a tirade during a conference concerning unsatisfactory work ratings (R. 73–74). In addition, on April 1, 1959, petitioner received a memorandum reprimanding her for persistently interrupting others during business hours by talking loudly about matters, both of a business and personal nature, in which they had no interest or concern (R. 240). Thus, on at least three occasions prior to the institution of removal proceedings, petitioner was disciplined for on-duty conduct.[5]

[5] Petitioner also contends that her removal was inequitable and arbitrary on the ground that specification 1 in Charge III contained "exaggerations and mis-statements" (Pet. 7–9). There is no basis for this contention. (See Memorandum from Joe Jamar to Miss McClellan dated October 13, 1958.) (R. 73–74). Similarly, petitioner's contention that "little effort" was made "to adhere strictly to the facts * * * in *Specifications 2 and 3 of Charge II*" (Pet. 9) is without substance. (See Memorandum from Joe Jamar to Miss McClellan dated April 1, 1959.) (R. 240–241.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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